A **MAYBANK INVESTMENT BANK BERHAD**

v.

HAMZAH MAHMOOD & ANOR

B HIGH COURT MALAYA, KUALA LUMPUR
AZIZAH NAWAWI JC
[CIVIL SUIT NO: D22NCC-530-2010]
24 APRIL 2014

C ***CONTRACT:*** *Employment contract - Breach - Claim by licensed stock broking firm against employee for losses incurred involving share trading activities - Failure to use reasonable care and skill in discharge of duties - Failure to comply with policies and guidelines - Whether breach of contract of employment established - Whether employee liable in damages*

D ***LABOUR LAW:*** *Employment - Contract of employment - Breach - Claim by licensed stock broking firm against employee for losses incurred involving share trading activities - Failure to use reasonable care and skill in discharge of duties - Failure to comply with policies and guidelines - Whether breach of contract of employment established - Whether employee liable for damages*

E

The plaintiff, a licensed stockbroker with Bursa Malaysia Securities Berhad ('Bursa'), dealt in stocks and shares listed on Bursa for its customers. The second defendant was the Head of the plaintiff's
F Credit Control Department ('CCD'). The plaintiff's claim against the second defendant was for the loss incurred by the plaintiff involving the shares of Liqua Health Corporation Berhad ('Liqua') and Fountain View Development Berhad ('Fountain View') said to have been caused by the second defendant's failure to use
G reasonable care and skill in the discharge of his duties and his failure to comply with the plaintiff's policies and guidelines. The issues to be tried were: (i) whether the second defendant had breached his duties to the plaintiff; (ii) whether the second defendant had breached his contract of employment; and
H (iii) whether the second defendant was obliged to act only in accordance with the Credit Control Procedure and Credit Control Guidelines. The plaintiff's breach of contractual case against the second defendant was premised on the Terms and Conditions of Employment Band "E" (exh. P16).

I

Held (allowing plaintiff's claim against second defendant with costs):

(1) Article 37 of exh. P16 provided that the second defendant was to comply with the express and implied terms of employment, which includes using reasonable care and skill in his daily work as the Head of CCD. As an employee of the plaintiff, the second defendant was not only to comply with the Credit Control Procedure and Credit Control Guidelines, it was also the duty of the second defendant to comply with the policies and guidelines of the plaintiff including policies based on the rules set by the regulatory authorities *ie*, Bursa Malaysia and the Securities Commission, Maybank Group Policies and Maysec's internal policies and guidelines. (paras 19, 23 & 24)

(2) The first and second defendants had jointly approved the increase in the limits of the margin facilities granted to six margin clients and the said limits exceeded the collateral requirement by RM160 to RM70,324. This conduct was in breach of para. 8 of Maysec's Credit Control and Credit Control Guidelines and the second defendant had therefore breached the terms of his contract of employment. The said approvals showed a failure of the second defendant to exercise due care, attention and prudence in the prevailing circumstances at the relevant time – that all the six applications for increase in margin facilities were secured against the Liqua shares, which were highly volatile, and that all the six applications were from clients of the same remisier, Wee Kok Bing, who was suspended a day earlier for overtrading in Liqua shares. (paras 26 & 27)

(3) The second defendant had further approved the increases in non-margin trading limits ranging from RM3 million to RM5 million for seven of the plaintiff's non-margin clients based on the value of the collaterals pledged against Liqua shares. The conduct of the second defendant in granting the approval was in breach of the 'Single Counter Exposure Policy' and the second defendant had therefore breached the terms of his contract of employment. (paras 31 & 36)

(4) Premised on the internal guidelines of Mysec, Align Matrix Sdn Bhd had a trading limit of RM3 million whilst Lim Eye Thun's had a maximum trading limit of RM1 million. Therefore, the second defendant was in breach of the said guideline when he allowed Matrix to reach RM21,972,543 and Lim Eye Thun to trade to a maximum of RM8,010,971 respectively. The conduct of the second defendant was in breach of the said policy and the second defendant had thus breached the terms of his contract of employment. (para 40)

(5) Between 31 May 2004 and 2 July 2004, the first and second defendants had jointly approved the Margin Trading Financing ('MTF') facility applications of four Fountain View margin clients. The approval of MTF facility limits, to be secured entirely with collateral in the form of Fountain View shares, was in breach of Mysec internal policy which required collateral of not less than three different counters to be pledged and the equity of pledging and purchase of a single counter shall not be more than 50% of the total equity. The conduct of the second defendant was also a breach of the terms of his contract of employment. (paras 41 & 42)

(6) The second defendant had also approved the applications for increases in the approved limit by two non-margin clients, Distinct Meridian and Absolute Dominian. These non-margin clients were allowed to trade-in excess of the maximum trading limit of RM7.34 million, imposed by Mysec internal policy. The conduct of the second defendant was in breach of the said policy and also in breach of his contract of employment. (paras 44 & 45)

(7) As the head of CCD, it was the duty of the second defendant to ensure compliance with these policies and regulations in order to limit the plaintiff's exposure to the risks in the market. As the second defendant had breached these policies and regulations, he had therefore breached the terms of his contract of employment and must therefore be liable to the damages which either arose in the usual course of things or which are reasonably foreseeable. (para 48)

Case(s) referred to:

Bolam v. Friern Hospital Management Committee [1957] 1 WLR 582 ***(refd)***

Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC ***(refd)***

Foo Fio Na v. Dr Soo Fook Mun & Anor [2007] 1 CLJ 229 FC ***(refd)***

Galoo Ltd (In Liq) v. Bright Grahame Murray (a firm) [1995]1 All ER 16 ***(refd)***

Malaysian Rubber Development Corporation Berhad v. Glove Seal Sdn Bhd [1994] 4 CLJ 783 SC ***(refd)***

Malayan Banking Bhd v. Basarudin Ahmad Khan [2007] 1 CLJ 309 FC ***(refd)***

Marfani & Co Ltd v. Midland Bank Ltd [1968] 2 All ER 573 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 3

Contracts Act 1950, s. 74(1)

For the plaintiff - Lam Ko Luen (Victoria Loi with her); M/s Shook Lin & Bok

For the 2nd defendant - Abdullah Abdul Rahman; M/s Cheang & Ariff

Reported by Amutha Suppayah

JUDGMENT

Azizah Nawawi JC:

Introduction

[1] The plaintiff is a licensed stockbroker with Bursa Malaysia Securities Berhad ('the Bursa'). It deals in stocks and shares listed on the Bursa for its customers. The second defendant was the head of the plaintiff's Credit Control Department ('the CCD') from 7 June 2002 until 26 May 2005 when he was dismissed from service after a disciplinary action was taken against him.

[2] The plaintiff's claim against the second defendant is for the loss incurred by the plaintiff involving the shares of Liqua Health Corporation Berhad ('Liqua') and Fountain View Development Berhad ('Fountain View') said to have been caused by the second defendant's failure to use reasonable care and skill in the discharge of his duties and his failure to comply with the plaintiff's policies and guidelines.

[3] After a full trial, the plaintiff's claim was allowed with costs and the second defendant had since filed an appeal against the said decision.

The Plaintiff's Case

[4] From the "plaintiff's case against the second defendant", the facts disclosed that pursuant to a vesting order dated 29 August 2006, the entire stock broking business of Mayban Securities Sdn Bhd ("MaySec") was transferred to Aseambankers Malaysia Berhad ("Aseambankers"). Aseambankers subsequently changed its name to Maybank Investment Bank Berhad.

[5] The second defendant was the head of the CCD of Maysec from 7 June 2002 until 26 May 2005 when he was dismissed from service after he was found to be guilty on four charges of misconduct (in relation to shares of Liqua) by the plaintiff's panel of domestic disciplinary inquiry. As the head of CCD, the second defendant's authority limit was as follows:

(i) Margin accounts:

The second defendant jointly with the chief executive officer had the authority to approve up till a limit of RM5 million; and

(ii) Non-margin accounts:

The second defendant singly had the authority to approve trading limits of up till RM5 million.

[6] The main thrust of the plaintiff's case is that the second defendant was required to observe all implied obligations and to use reasonable skill in the discharge of his duties and to adhere to the plaintiff's policies and guidelines involving the shares of two counters, Liqua and Fountain View.

[7] Therefore, when the second defendant had failed to observe all implied obligations and to use reasonable skill in the discharge of his duties and to adhere to the plaintiff's policies and guidelines, this has resulted in the plaintiff incurring huge losses in the trading involving the shares of two counters, Liqua and Fountain View.

[8] With regards to the Liqua shares, the plaintiff submits that:

(i) that on or about 8 October 2004, the first and second defendants had jointly approved the increase in the limits of the margin facilities granted to six of the plaintiff's margin

clients, secured in the form of Liqua shares and cash as collaterals, despite the volatility of Liqua shares and despite the facts that these six margin clients were clients of one remisier, Wee Kok Bin who had been suspended from buying a day earlier, on 7 October 2004, for overtrading in Liqua shares;

(ii) that this approval contravened the credit control procedure and credit control guidelines as the margin limits for the six margin clients exceeded the collateral requirement by RM160 to RM70,324 as at 8 October 2004;

(iii) that between 19 July 2004 and 2 August 2004, the second defendant had approved increases in the non-margin trading limits ranging from RM3 million to RM5 million for seven of the plaintiff's non-margin clients based on the values of the collateral pledged against Liqua shares despite the plaintiff's exposure to Liqua shares during that period which had exceeded 10% of Liqua's paid-up capital of RM270 million following (ranging from RM28,577,257 to RM73,028,758). The plaintiff's exposure to the Liqua shares at the material time had already exceeded the maximum limit allowed. The second defendant's approval had thus contravened the plaintiff's internal policy on the single counter exposure which is up to 10% of Liqua's paid up capital of RM270 million;

(iv) that the second defendant had, in breach of his duties as head of CCD and/or in breach of the internal policy on trading limit allowed two of the plaintiff's non-margin clients trading in Liqua shares, namely Align Matrix Sdn Bhd and Lim Eye Thun to trade above their respective 'maximum allowable limit' of RM3 million and RM1 million respectively. The pre-set limit in the guidelines stipulate that the limit is ten times of the approved trading limit or RM5 million, whichever is lower. However the outstanding position of Align Matrix Sdn Bhd and Lim Eye Thun as at 7 October 2004 stood at RM21,972,543 and RM8,010,917 respectively;

(v) that on 7 October 2004, the Liqua shares close at RM1.62 and on 8 October 2004 to close at RM0.93;

(vi) that the plaintiff was exposed to losses as a result of the high exposure to the Liqua shares due to the defendants' failure to observe to the policies of the plaintiff; and

(vii) eventually all the Liqua shares were sold by the plaintiff on 6 March 2007 resulting in a loss of RM11,904,010 to the plaintiff.

[9] With regards to the Fountain View shares, the plaintiff submits that:

(i) Between 7 June 2004 and 2 July 2004, the first and second defendants jointly approved the limits for margin accounts of four of the plaintiff's margin clients which were secured by collateral solely in the form of Fountain View shares;

(ii) At that material time, the second defendant was fully aware and had knowledge that there was non-compliance of the following:

(a) Plaintiff's policy which requires collateral not less than three different counters to be pledged for margin accounts and the equity pledged and purchases of a single counter shall not be more than 50% of the total shares; and

(b) Plaintiff's policy on single counter exposure/concentration of share pledged and purchase which should not be more than 50% of the total equity;

(iii) The second defendant had therefore contravened the above mentioned policies;

(iv) Between the period of 28 April 2005 and 6 May 2005, the prices of the Fountain View shares dropped sharply and the plaintiff was exposed to losses as a result of the high exposure to the Fountain View shares and second defendant's failure to observe the plaintiff's policies;

(v) As a result thereof, the plaintiff had to force sell the Fountain View shares and after having taken into account the proceeds of such sale, the plaintiff had suffered a loss of RM42,078,200 as at 12 July 2005;

(vi) As at 5 March 2010, there remains an outstanding balance of RM58,279,772.50 in respect of the Fountain View shares for the non-margin and margin accounts.

The Second Defendant's Case

[10] It is the second defendant's case that the credit control procedure and credit control guidelines were based on either the rules and guidelines set out by the KLSE, Maybank group's policies or the plaintiff's internal policies.

[11] The second defendant submits that the practice within the plaintiff was always to follow the rules and guidelines of KLSE then in force and this was known and acquiesced to by the plaintiff including its board of directors. The plaintiff did not require its employees to strictly adhere to its internal rules and policies.

[12] It is the second defendant's case that the credit control procedure and credit control guidelines were not contravened or were applicable to the facts alleged by the plaintiff as the second defendant was not found guilty by the plaintiff's tribunal that heard the domestic inquiry and that there is a difference between 'approved trading limit' and 'actual trading limit'.

[13] The grant or increase in the approved trading limit of the margin trading facilities on its own would not expose the plaintiff to losses. The plaintiff would only be exposed when the clients start making purchases and the clients would be required to have sufficient collateral shares in their trading account.

[14] With regards to Liqua shares, the second defendant case is that:

(i) with regards to the increase of the trading limit, the second defendant was not found guilty by the plaintiff's tribunal in relation to allegation that the as a result of the approval granted by the second defendant, the margin limits for six individuals exceed the collateral requirement by RM160 to RM70,324;

(ii) that the plaintiff had already entered into an agreement with the clients to increase the limits of the margin facilities granted to the six and this agreement had been entered into by chief executive officer (first defendant) and executive director (Operation) of the plaintiff with the clients during a meeting on 8 October 2004. The second defendant just put his signature on the documents;

(iii) that the guideline or multiplier to evaluate the approved trading limit as set out at para. 8.1 of the credit control procedure and policy does not mean that the approved trading limit allocated to the clients cannot be higher than the amount arrived at after applying the guideline or multiplier;

(iv) that as at 15 February 2005 these clients were all above the doubtful status in so far as their margin positions were concerned. Under Bursa Malaysia Rules applicable at that time, the margin position of a margin account should not fall below 130% ie, the value of collateral security should not fall below 130% of the outstanding amount due to the plaintiff. As at 15 February 2005 their respective margin positions were above the required level;

(v) with regards to the exposure to single counter, it is the second defendant case that the plaintiff had a single counter procedure which does not prohibit the plaintiff from being exposed to single counter and does not make causing exposure to single counter a disciplinary offence;

(vi) that the single counter procedure was based on r. 17E of the Rules Relating to Members Company of the KLSE. Rule 17E was complied with when it was still in force. After r. 17E had been revoked, the plaintiff followed the rule that repealed r. 17E, which was rule in Chapter 11 of Rules of Bursa Malaysia Securities Berhad on Capital Adequacy Requirement ('CAR'). It was the plaintiff's practice to comply with CAR from thereon and this was condoned by the plaintiff;

(vii) With regards to the maximum allowable actual trading limit, the second defendant submits that there was no guideline of the plaintiff that stipulates the maximum allowable limit is ten times the approved trading limit or RM5 million whichever is lower or such guideline was not in force at the material time. There was in place an internal practice of the credit control department of the plaintiff a 'circuit breaker' at ten times the approved trading limit or RM5 million whichever is lower which was practiced without reference to any documented guideline;

(viii) The second defendant in allowing two of the plaintiff's non-margin clients trading in Liqua shares, namely Align Matrix Sdn Bhd and Lim Eye Thun to trade above their respective "maximum allowable limit" was more secure than allowing the said clients to increase their approved trading limits, which they could, and then later trade; and

(ix) The plaintiff's computer for triggering the 'circuit breaker' was not fully functioning for some period on the material day. Therefore, the credit control department was unable to monitor whether the purchases of Liqua shares through Wee Kok Bin were done in accordance with the trading limitation imposed on him.

[15] With regards to the Fountain View shares, the second defendant submits that the domestic inquiry conducted by the plaintiff against the second defendant that led to his dismissal did not cover any issue with regard to Fountain View shares when the domestic inquiry extensively covered issues with regard to Liqua shares with five charges preferred against him.

[16] Premised on the above, the second defendant submits that the losses suffered by the plaintiff for the Liqua and Fountain View transactions were not caused by the conduct of the second defendant.

Agreed Issues To Be Tried

[17] The agreed issues to be tried are:

(i) whether the second defendant has breached his duties owed to the plaintiff; and/or

(ii) whether the second defendant has breached his contract of employment; and/or

(iii) whether the second defendant is obliged to act only in accordance with the credit control procedure and credit control guidelines; and

(iv) whether the plaintiff is entitled to the remedies prayed for in para. 43 of the amended SOC or any part thereof.

The Findings Of The Court

Issue (i) Whether The Second Defendant Has Breached His Duties Owed To The Plaintiff

[18] With regards to issue (i), having considered the pleadings, I agree with the submission of learned counsel for the second defendant that the claim premised on torts is not pleaded as against the second defendant. As such, I will not consider issue (i) as it is not a pleaded issue.

Issues (ii) Whether The Second Defendant Has Breached His Contract Of Employment; And

Issues (iii) Whether The Second Defendant Is Obliged To Act Only In Accordance With The Credit Control Procedure And Credit Control Guidelines

[19] The plaintiff's breach of contractual case against the second defendant is premised on the terms and conditions of employment band "E", exh. P16 which takes effect from 1 March 2004 and covers the period of time when the second defendant was Head of CCD. Article 37 of exh. P16 provides that the second defendant is to comply with the express and implied terms of employment, including the use of reasonable care and skill in his daily work as the head of CCD. Article 37 reads as follows:

> 2. Apart from the expressed terms and conditions of employment, the executive is also required to observe all other implied obligations and duties which include but are not limited to the following:
>
> (a) To be ready and willing to work;
>
> (b) To use reasonable care and skill;
>
> (c) To obey lawful orders;
>
> (d) To take care of the Company's property;
>
> (e) To act in good faith.

[20] The second defendant, whilst admitting that his employment falls under "band E" however disputed the application of exh. P16, where during re-examination, he said as follows:

> One thing, this document was not addressed to me based on my experience as Human Resource Manager. Terms and conditions of Employment, one copy will be given to the employee, one copy will be kept by the company after it is signed by the respective employee and the document here, there's no indication of any signature.

[21] However, I agree with the submission of the plaintiff that exh. P16 expressly states that it contains the "general terms and conditions of employment applicable to "band E" and is "Effective 1 March 2004"; therefore since the second defendant had confirmed that his employment falls within band E, then exh. P16 is applicable to him.

[22] The issue then is whether the second defendant had breached the express or implied terms of the contract of employment. With regards to a breach of the express or implied term in a contract, the Federal Court in *Malayan Banking Bhd v. Basarudin Ahmad Khan* [2007] 1 CLJ 309 held at pp. 322-323:

> [21] On contractual duty of an employee, in *Lister v. Romford Ice and Cold Storage Co Ltd* [1957] AC 555, Viscount Simonds at p. 573 observed:
>
> > But, in deference to Denning LJ, I think it right to say that I concur in what I understand to be the unanimous opinion of your Lordships that the servant owes a contractual duty of care to his master, and that the breach of that duty founds an action for damages for breach of contract, and that this (apart from any defence) is such a case. It is trite law that a single act of negligence may give rise to claim either in tort or for breach of a term express or implied in a contract. Of this the negligence of a servant in performance of his duty is a clear example.
> >
> > ...
> >
> > The common law demands that the servant should exercise his proper skill and care in the performance of his duty: the graver the consequences of any dereliction, the more important it is that the sanction which the law imposes should be maintained. That sanction is that he should be liable in damages to his master: other sanctions there may be, dismissal perhaps and loss of character and difficulty of getting fresh employment, but an action for damages, whether for tort or for breach of contract, has, even if rarely used, for centuries been available to the master ...

[23] As an employee of the plaintiff, it is my considered opinion that it is the duty of the second defendant to comply with the policies and guidelines of the plaintiff, and this includes the following policies:

(i) Policies based on the rules set by the regulatory authorities ie, Bursa Malaysia and the Securities Commission;

(ii) Maybank group policies; and

(iii) Maysec's internal policies and guidelines.

[24] As such, the second defendant is not only to comply with the credit control procedure and credit control guidelines.

(i) The Liqua Shares

[25] With regards to the issue of the increase in margin limits of six Liqua margin clients, in paras. 6 and 7 of the agreed facts the parties have agreed to the following facts:

> Margin Client
>
> 6. On or about 8.10.2004, the 1st and 2nd Defendants had jointly approved the increase in the limits of the margin facilities granted to six (6) of the Plaintiff's margin accounts. The margin facilities granted to these six (6) individuals were secured in the form of Liqua Shares and cash.
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> 7. The margin limits for the six (6) individuals exceeded the collateral requirement by RM160.00 to RM70,324.00 (as at 8.10.2004) are as follows:

Margin Client	Margin Limit as approved by 1st and 2nd Defendants (RM)	Value of Collateral (RM)			Exceed (RM) by
		Cash x3 (RM)	Liqua Shares x2 (RM)	Total (RM)	
Chin Pak Sin	2,100,000	20,876	2,008,800	2,029,676	70,324
Lee Suit Kwan	1,000,000	26,248	960,984	987,232	12,768
Ho Long @ Tan How Liang	2,900,000	-	2,851,200	2,851,200	48,800
Chan Choy Wan	2,300,000	-	2,268,000	2,268,000	32,000
Khairudin Bin Mohd Khir @ Abdul Majid	2,600,000	233,609	2,274,480	2,508,089	91,911
Jamros Bin Seman	700,000	-	699,840	699,840	160

[26] It is therefore common ground that on or about 8 October 2004, the first and the second defendants had jointly approved the increase in the limits of the margin facilities granted to six margin clients and that the said limits exceeded the collateral requirement by RM160 to RM70,324 as per the particulars in para. 7 of the agreed facts. As such, this conduct is in breach of para. 8 of

Maysec's credit control and credit control guidelines and the second defendant had therefore breached the terms of his contract of employment.

[27] At the same time, I agree with the submission of learned counsel for the plaintiff that the said approvals given on 8 October 2004 show a failure of the second defendant to exercise due care, attention and prudence in the prevailing circumstances at the relevant time – that all the six applications for increase in margin facilities were secured against the Liqua shares, which were highly volatile, and that all the six applications were from clients of the same remisier, Wee Kok Bin, who was suspended a day earlier on 7 October 2004 for overtrading in Liqua shares.

[28] I am also of the opinion that the actions of the second defendant in increasing the limits are not remedial measures as submitted by learned counsel for the second defendant, in the sense of recovery as the increase is for the purpose of buying shares from the non-margin accounts which was subject to forced selling. In the words of PW1 "these clients are trading collectively under one remisier. They are connected in certain ways. If there are the same group of people buying shares from another, it is like transferring the losses from one pocket to another." (see p. 26, line 19-21).

[29] It is also the submission of the second defendant that the plaintiff must lead evidence to show the current practice of a reasonable person with ordinary skills as head of CCD of a stock broking house with reference to the Bolam test as set out in *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582. However, the Federal Court in *Foo Fio Na v. Dr Soo Fook Mun & Anor* [2007] 1 CLJ 229 held that the Bolam test is no longer applicable. In any event, I agree with the submission of learned counsel for the plaintiff that the second defendant's reliance on *Marfani & Co Ltd v. Midland Bank Ltd* [1968] 2 All ER 573 is misplaced as this case did not decide that it was mandatory to lead expert evidence on general banking practice. So long as there is evidence on the general practice of the defendant bank, and the absence of different practices among bankers, the court may accept the evidence of the bank on the normal banking practice. In the present case, there is evidence of the two auditors on the

transaction of the shares which are substantiated with documents. Further, the second defendant did not seek to establish that the practise in the plaintiff's bank is against established practices in the industry.

[30] With regards to the increase in trading limits of seven Liqua non-margin clients, para. 8 of the agreed facts reads:

> 8. Between 19.7.2004 and 2.8.2004, the 2nd Defendant further approved the increases in non-margin trading limits ranging from RM3 million to RM5 million for seven (7) of the Plaintiff's non-margin clients based on the value of the collateral pledged against Liqua shares.
>
> PARTICULARS

Non-Margin clients	Approved Limit (RM)	Approved on	Collateral Value on date of approval (RM)
(a) Mohd Fadzil Mohd Ali	5,000,000.00	19.7.2004	2,379,796.00
(b) Goh Jooi Ann	5,000,000.00	2.8.2004	1,134,239.00
(c) Lee Chai Hua	3,000,000.00	19.7.2004	1,460,400.00
(d) Muhammad Md Ali	4,000,000.00	27.7.2004	1,172,400.00
(e) Rafizah Bte Abu Hassan	5,000,000.00	23.7.2004	1,682,962.00
(f) Lim Paik Gaik	5,000,000.00	19.7.2004	2,254,992.00
(g) Chan Wan Cheong	3,500,000.00	19.7.2004	1,176,700.00

> 9. Align Matrix Sdn Bhd ("Align Matrix") and Lim Eye Thun who were non-margin clients trading in Liqua shares had trading limits of RM3,000,000.00 and RM5,000,000.00 respectively.

[31] It is therefore common ground that between 19 July 2004 and 2 August 2004, the second defendant had further approved the increases in non-margin trading limits ranging from RM3 million to RM5 million for seven of the plaintiff's non-margin clients based on the value of the collaterals pledged against Liqua shares, as can be seen from the particulars in the table at para. 8.

[32] I accept the evidence of PW3, and supported by the minutes of meeting dated 2 March 1998, that the 'single counter exposure policy' is part of the internal policy of the plaintiff. The purpose of this policy is to identify and restricts the exposure to a single counter. Pursuant to this policy, PW1 gave evidence that Mysec's total outstanding exposure to the Liqua share should not exceed 10% of Liqua paid up capital of RM270 million, that is, the exposure must not exceed RM27 million.

[33] Further the daily report, daily consolidated single security exposure exception report or CR101X reports shows that Mysec exposure had exceeded 10% of Liqua paid up capital at that relevant time. The exposure ranged from RM38,577,257 to RM73,028,758.

[34] Therefore, I am of the considered opinion that the second defendant had breached the said policy by increasing the trading limits ranging from RM3 million to RM5 million for seven of the plaintiff's non-margin clients based on the values of the collaterals pledged against Liqua shares, which had clearly exceed the 10% exposure.

[35] I agree with the submission of the plaintiff that the evidence shows that despite the fact that the second defendant was aware or ought to have been aware, at the material time that Maysec's exposure to the Liqua counter had exceeded 10% of Liqua's paid-up capital, the second defendant proceeded to approve the increase in the limits of seven Liqua non-margin clients which were based entirely upon collateral in the form of Liqua shares, thus further exposing Maysec's position.

[36] In the premise, I find that the conduct of the second defendant in granting the approval is in breach of the 'single counter exposure policy' and the second defendant had therefore breached the terms of his contract of employment.

[37] As to whether the Bursa Capital Adequacy Ratio ("CAR") was breached or not was not relevant here as the second defendant still has to comply with the plaintiff's and Mysec policies, rules and regulations, which may be more stricter than Bursa requirements.

[38] In para. 9 of the agreed facts, it is agreed that Align Matrix Sdn Bhd and Lim Eye Thun, who were non-margin clients had trading limits of RM300,000 and RM100,000 respectively.

[39] The internal guidelines of Mysec stipulates that "... the maximum actual trading allowable is ten times the approve limits or RM5 million, whichever is lower."

[40] Premised on the said guidelines, Align Matrix would have a trading limit of RM3 million whilst Lim Eye Thun's maximum trading limit was RM1 million. Therefore the second defendant was in breach of the said guideline when he allowed Matrix to reach RM21,972,543 and Lim Eye Thun traded to a maximum of RM8,010,971 respectively. In the premise, I find that the conduct of the second defendant is in breach of the said policy and the second defendant had therefore breached the terms of his contract of employment.

(ii) The Fountain View Shares

[41] Between 31 May 2004 and 2 July 2004, the first and second defendants had jointly approved the Margin Trading Financing (MTF) facility applications of four Fountain View margin clients:

No.	Client	Date of Approval	Approved MTF Facility Limit
(a)	Sagatrack Sdn. Bhd. ("Sagatrack")	2.7.2004	RM5,000,000.00
(b)	Koleksi Generasi (M) Sdn. Bhd. ("Koleksi Generasi")	31.5.2004	RM5,000,000.00
(c)	Outlook Rose Sdn. Bhd. ("Outlook Rose")	2.7.2004	RM2,000,000.00
(d)	Intelone Sdn. Bhd. ("Intelone")	2.7.2004	RM2,000,000.00

[42] It is not in dispute that the MTF Facility limits approved by the second defendant in respect of the four Fountain View margin clients were secured entirely with collateral in the form of Fountain View shares. This approval is in breach of Mysec internal policy which requires collateral of not less than three different counters to be pledged and the equity of pledging and purchase of a single counter shall not be more than 50% of the total equity. The purpose of this policy is to minimise Maysec's exposure to risks and to avoid concentration risks in relation to shares pledged and purchased ie, in the event the price of a particular counter drops, there would be other types of shares pledged as collateral which could be used by the plaintiff to settle the outstanding position of its clients.

[43] In the premise, I find that the conduct of the second defendant in approving the MTF Facility limits of the four Fountain View margin clients to be secured entirely with collateral of Fountain View shares is in breach of the said policy and the second defendant had therefore breached the terms of his contract of employment.

[44] The second defendant had also confirmed that his signature of approval of applications for increases in the approved limit by two non-margin clients, Distinct Meridian and Absolute Dominion. These non-margin clients were allowed to trade in excess of the maximum trading limit of RM7.34 million, imposed by Mysec internal policy, which provides that:

> 2) Multiplier for shares collateral shall be revised from five (5) times to 2.5 times for trading within client's approved limit and one (1) time above the client's approved limit.

[45] In the premise, I find that the conduct of the second defendant is in breach of the said policy and the second defendant had therefore breached the terms of his contract of employment.

Issue (iv) Whether The Plaintiff Is Entitled To The Remedies Prayed For In Para. 43 Of The Amended SOC Or Any Part Thereof

[46] As this case is premised on breach of contract, pursuant to s. 74(1) of the Contracts Act 1950, the loss and damages is either (i) "as may fairly and reasonably be considered either arising naturally; or (ii) such as may reasonable be supposed to have been in the contemplation of parties as the probable result of the breach ..."

[47] In *Malaysian Rubber Development Corporation Berhad v. Glove Seal Sdn Bhd* [1994] 4 CLJ 783; [1994] 3 MLJ 569, the Supreme Court held that:

> ... that the '**normal measure of damages for breach of contract in this country is prescribed by s. 74(1) of the Contracts Act 1950**, which is the statutory enunciation of *Hadley v. Baxendale*.
>
> *In essence, the section states that the party may recover any loss or damage for any breach which: (a) naturally arose in the usual course of things; or (b) which the parties knew, when they made the contract, to be likely to result from the breach of it.*

A

> ... Thus, s 50(2) states that the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract ... (emphasis added)

B **[48]** It is common ground that the policies and regulations of the plaintiff are to prevent losses in the share markets. As the head of CCD, it is the duties of the second defendant to ensure compliance with these policies and regulations in order to limit the plaintiff's exposure to the risks in the market. As the second defendant had breached these policies and regulations, he had C therefore breached the terms of his contract of employment and must therefore be liable to the damages which either arose in the usual course of things or which are reasonably foreseeable.

[49] I agree with the submission of learned counsel for the D plaintiff that it is reasonably foreseeable that the plaintiff would be heavily exposed in the share market if the limits set by the internal policies are not adhered to. It is also reasonably foreseeable that share prices fluctuate significantly, especially when the shares are volatile. As such, it is reasonably foreseeable that there will be a E drop in the share prices which causes the customers who traded in those shares may not be able to pay for the shares and resulting in the plaintiff suffering loss and damages.

[50] As a result of the second defendant's conduct, Maysec was F exposed to tremendous losses and Maysec had taken steps to mitigate the loss and damage it would otherwise have suffered. PW6, a former assistant manager in the credit recovery unit in the CCD, gave evidence on the losses suffered by the plaintiff arising from the transactions involving Liqua shares and the recovery G measures taken. He gave evidence that as a result of the drop in the price of the Liqua shares, many of the plaintiff's clients were unable to pay the plaintiff in a timely manner.

[51] Ultimately, the plaintiff had sold all the Liqua shares pledged as collateral by the plaintiff's clients as well as the clients' H outstanding purchase to Tacforce International (Malaysia) Sdn Bhd for a sum of RM36,961,380 and this was applied towards the various clients' accounts. Even after taking into account the said proceeds, there was still a shortfall of RM8,552,768.44.

I

[52] With regards to the Fountain View shares, PW5, the assistant manager, credit recovery unit, CCD (now known as the credit management department) gave evidence on the recovery efforts taken, including the issuance of letters of demand and filing of legal proceedings. The evidence shows that Maysec (and subsequently, the plaintiff) had exhausted all avenues of recovery against Sagatrack, Koleksi Generasi, Intelone, Outlook Rose, Distinct Meridian and Absolute Dominion where these companies have been wound up and some of the individual guarantors adjudicated as bankrupts.

[53] Despite the plaintiff's efforts, as at 23 April 2013, the outstanding losses amount to RM23,037,709.79. As at 23 April 2013, the total outstanding balance consisting of outstanding losses in respect of Fountain View shares amount to RM45,559,598.19.

[54] Learned counsel for the second defendant submitted on the application of the principle in the case of *Galoo Ltd (In Liq) v. Bright Grahame Murray (a firm)* [1995] 1 All ER 16 with regards to the issue of causation, whether the acts of the second defendant had caused the losses to be incurred. In *Galoo* case Glidewell LJ held at p. 29, paras. g-i:

> The passages which I have cited from the speeches in the Monarch Steamship case make it clear that if a breach of contract by a defendant is to be held to entitle the plaintiff to claim damages, it must first be held to have been an 'effective' or 'dominant' cause of his loss. The test in *Quinn*'s case, that it is necessary to distinguish between a breach of contract which causes a loss to lose, is helpful but still leaves the question to be answered, 'How does the court decide whether the breach of duty was the cause of the loss or merely the occasion for the loss?'
>
> The answer in my judgment is supplied by the Australian decisions to which I have referred, which I hold to represent the law of England as well as in Australia, in relation to a breach of a duty imposed on a defendant whether by contract or in tort in a situation analogous to a breach of contract. The answer in the end is, 'By the application of the court's common sense.'
>
> Doing my best to apply the test, I have no doubt that the deputy judge arrived at a correct conclusion on this issue. The breach of duty by the defendants gave the opportunity to Galoo and Gamine to incur and to continue to incur trading losses; it did not cause those trading losses, in the sense in which the word 'cause' is used in law.

[55] With regards to the principle in *Galoo* case as submitted by learned Counsel for the second defendant, I am of the considered opinion that since the test to determine damages recoverable with regards to breach of contract are provided under s. 74 of the Contracts Act 1950, therefore pursuant to s. 3 of the Civil Law Act 1956, the common law position in *Galoo* case is not applicable. In *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57, it was submitted before the Supreme Court to consider the issue of illegality under common law. The court held at p. 66:

> ... That was the position in common law. But the Courts are bound by the statutory provisions in our Contract Act.
>
> ...
>
> Section 3 of the Civil Law Act 1956 directs the Court to apply the common law of England only in so far as the circumstances permit and save where no provision has been made by the statute law. The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the Courts in this country. We cannot just accept the development of the common law in England.

[56] In any event, I am also of the considered opinion that *Galoo* case is factually different as there are issues of 'intervening acts of a third party' or 'intervening events', which is clearly not the second defendant's pleaded case here.

Conclusion

[57] Premised on the reasons enumerated above, the answers to the agreed issues to be tried are as follows:

(i) whether the second defendant has breached his duties owed to the plaintiff - Not pleaded

(ii) whether the second defendant has breached his contract of employment - Positive

(iii) whether the second defendant is obliged to act only in accordance with the credit control procedure and credit control guidelines - Negative

(iv) whether the plaintiff is entitled to the remedies prayed for in para. 43 of the amended SOC or any part thereof - Positive.

[58] In the premise, I had allowed the plaintiff's claim as against the second defendant on the following terms:

(i) damages of RM8,552,768.44 in respect of the Liqua shares;

(ii) damages of RM45,559,598.19 in respect of the Fountain View shares;

(iii) 5% interest from 21 December 2010 to full settlement; and

(iv) cost of RM100,000.